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Nos. 91-790 - 91-1206

In The

Supreme Court of the United States

October Term, 1992

CSX TRANSPORTATION, INC.,

Petitioner,

vs.

LIZZIE BEATRICE EASTERWOOD,

Respondent.

LIZZIE BEATRICE EASTERWOOD,

Cross-Petitioner,

vs.

CSX TRANSPORTATION, INC.,

Cross-Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT IN CASE NO. 91-790
BRIEF FOR CROSS-PETITIONER IN CASE NO. 91-1206

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QUESTIONS PRESENTED

I.

Whether Georgia's common-law duty of due care which requires a railroad to place gate arms at a hazardous railroad crossing is preempted by the Federal Railroad Safety Act.

II.

Whether Georgia's common-law duty of due care which requires a railroad to reduce its speed in a hazardous area is preempted by the Federal Railroad Safety Act.

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STATEMENT OF THE CASE

Factual Background

On the morning of February 24, 1988, Thomas Easterwood went to work at Duncan Wholesale in Cartersville, Georgia, where he had been a delivery truck

driver for nineteen years. He loaded his long bed International truck and left for his first delivery.

It was a cold, clear winter day as Mr. Easterwood came to the Cook Street railroad crossing at approximately 8:52 a.m.. He was driving slowly and carefully east toward the crossing (R. at V.3, D.24, affidavit of Tim Shepherd, p.1) at a speed of about 10 miles per hour, with the morning sun shining on his windshield (R. at V.4, D.28, Ex.6, p.4). At the same time a CSX engine was running backward (with the long end forward) pulling one car (R. at V.4, D.28, Ex. 5,6). The train approached the Cook Street crossing at a speed of between 32 and 50 miles per hour. (R. at V.4, D.28, Ex. 5,6; V. 3, D.24).

Mr. Easterwood attempted to negotiate this hazardous crossing in his long bed truck apparently unaware of the oncoming train. The crossing was equipped only with flashing lights and bells which activated a moment before Mr. Easterwood passed. Mr. Easterwood was killed when his truck was violently struck by Petitioner's train. (R. at V.3, D.24, p.1 Affidavit of Tim Shepherd).

The Cook Street crossing had been the scene of at least seven grade crossing collisions since 1981. (R. at V.4, D.28, affidavit of Thomas Culpepper and attachments thereto) due in part to the existence of hazardous conditions in the immediate vicinity. First, the curve in the track just north of the crossing permits only 150 feet of sight distance for a motorist looking for a train. (Depo. of Fogarty, p.61). Second, the vegetation that had been allowed to grow along the side of the track obscured and hindered a motorists' vision who attempted to negotiate the crossing. And third, the existing signals at the crossing frequently malfunctioned and produced false warnings, (Depo. of Burnham, p.28, l.4-8).

The Cook Street crossing is heavily utilized by vehicular traffic, as it is located near the center of Cartersville, with its track running adjacent and parallel to one of the city's busiest streets.

Petitioner has charged the Railroad with negligence in failing to install gate arms at this crossing and with negligence in failing to reduce its speed under the then existing circumstances.

SUMMARY OF THE ARGUMENT

The present case presents the question of federal preemption of two traditional state interests; i.e. the state's common law duties requiring a railroad to erect gate arms at a hazardous crossing and reduce their speed at such crossings. Because this case involves the preemption of Georgia's traditional police power, Respondent/Cross-petitioner is initially entitled to a presumption that her claims against CSX are not preempted. *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed. 2d 86 (1989).

In deciding whether the *Federal Railroad Safety Act* preempts these two historic state law duties, this Court must begin with the plain language of the statute. 45 U.S.C. § 434 contains three components, each of which demonstrate that Congress intended to broadly preserve the authority of the states in regulating rail safety and intended to preempt state authority in only one narrowly defined circumstance. Congress did so by broadly preserving state law "relating to" railroad safety until the Secretary of Transportation adopts a rule covering the subject matter of the state requirement. Congress then reinstated state regulations "relating to" a subject matter

covered by the Secretary where state law addresses a "local safety hazard". To avoid a lapse in regulation and to avoid the "enactment of a broad authorizing federal statute from preempting the field . . . " Congress only allowed preemption of state law when the Secretary adopts *specific* rules completely covering the same subject matter of the state requirement. *Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 14417, H.R. 14478 and S. 1933*, 91st Cong., 2nd Sess. 51 (1970).

The Secretary has passed no preemptive regulations which cover the subject matter of when a railroad must erect gate arms at a hazardous crossing not updated with federal funds. Nor has the Secretary passed preemptive regulations completely covering the subject matter of train speed.

Legislative history along with the history of the railroad grade crossing problem support the contention that the FRSA was never intended to broadly preempt these two state tort law duties.

States have always maintained an active role in the selection of grade crossing protection devices, and in regulating the speed of trains. The federal government, since 1916, has assisted the states and the railroad in reducing accidents and deaths at grade crossings by providing funds, guidance and coordination. Railroads have always been responsible for making their crossings safe and reducing their speed to a speed reasonable and safe under the existing conditions. Despite the infusion of federal money in 1916 and 1933 deaths and injuries at grade crossings continued to escalate. In response Congress passed the *Federal Railroad Safety Act* (FRSA) and the

Federal Highway Safety Act (FHWA) which provide mechanisms for the appropriation of federal funds to assist in alleviating the high number of accidents at railroad grade crossings and "to reduce deaths and injuries to persons".

The railroad advances the argument that the Congress and the Secretary, in attempting to promote safety and reduce accidents, simultaneously choose to remove the railroad's state law duties and absolve them of all liability when they travel at a speed up to 110 mph through a city with inadequately protected grade crossings. Mrs. Easterwood advances the argument that the FRSA and FHWA only provide mechanisms for the receipt of federal funds to improve grade crossings. Traditional principals of state tort law were preserved to ensure a "continuing interest on the part of the railroad in bringing about a reduction in grade crossing accidents". *Report to Congress: Railroad Highway Safety, Part II: Recommendations for Resolving the Problem*, (August, 1972) p.27.

In an attempt to support its argument that the Secretary has "covered the subject matter" of grade crossing protection and simultaneously absolved them from liability, the railroad points to the *Code of Federal Regulations* (C.F.R.) and to selected language in the *Manual on Uniform Traffic Control Devices* (MUTCD). The C.F.R., however, only applies to crossings updated with federal funds and merely provides guidelines for prioritization of crossings eligible to receive those funds. The MUTCD has no warrants which specify "the installation of certain devices at crossings with certain characteristics". *Rail*

Highway Crossings Study; Report of the Secretary of Transportation to the United States Congress, (April, 1989) p.4-8.[1]

Nevertheless, the railroad argues that the MUTCD grants the exclusive authority to the states for the selection of traffic control devices and so the railroad is no longer responsible for making their crossings safe. This argument is clearly contradicted by the express language of the MUTCD, the DOT Handbook and the Secretary of Transportation herself.[2] The MUTCD and the DOT Handbook continually state that the responsibility for the determination and need of traffic control devices is shared between the railroad, state and the local agency with jurisdiction over the crossing. Nothing in the C.F.R. or MUTCD prevents a railroad from determining that improved grade crossing devices are needed, seeking approval from the state and implementing the devices with their own funds should the request be approved but federal funds not be made available. Granted, if the state or local agency refused the railroad's request, the railroad would have an excellent defense to a negligence claim based on a duty to improve the crossing. This question, which is not presented by the present case, however, is a question of state tort law, not one of federal preemption.

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[1] The Solicitor General as Amicus Curiae also argues that there is no standard in the MUTCD which "purport[s] generally to determine the circumstances in which a particular safety device is needed" (p.21). The Solicitor argues also that the regulations in the C.F.R. apply only to projects being updated with federal funds (p.19).

[2] The Secretary of Transportation has never construed the law as vesting the state agencies with the exclusive duty to determine the need for and selection of grade crossing devices. (Brief of the Solicitor General, at p.13).

The railroad however argues that they are no longer required to pay a share of the cost of a federally funded improvement, or any other improvement because the Secretary has determined that grade crossing protection is of no benefit to the railroad. This is totally false. The Secretary, in determining the benefit of improved grade crossing protection took into consideration the benefit received by the railroad of reduced tort liability. The Secretary determined however that because the railroad is responsible for maintaining these devices once they are installed, and the maintenance cost is greater than the reduction in tort liability, there is no "*net* benefit" to the railroad. *Report to Congress, Railroad Highway Safety, Part II*, p.27, p.103 (Emphasis added). Elimination of tort liability, therefore, would destroy the basis used in designing the Secretary's scheme of regulation.

Similarly, in implementing railroad safety rules regarding speed, the Secretary recognized speed restrictions imposed on the railroad by state requirements and local ordinances. CSX cites a portion of the Secretary's August, 1972 report to support its argument that the Secretary intentionally removed state speed restrictions due to a concern over the cost to the railroad in accelerating and decelerating trains. (Cross-respondent's brief at p.49). CSX fails however, to inform the Court that the Secretary further stated in this regard that "[i]t is assumed that these restrictions would be removed in each area where all grade crossings along a given rail line were eliminated" by the construction of an overpass or underpass. *Report to Congress: Railroad Highway Safety, Part II: Recommendations for Resolving the Problem,* (August, 1972, p.38).

The Secretary, therefore, clearly expected state speed restrictions to remain in full force where trains travel across public roads at grade. It follows that the Secretary, in enacting 49 C.F.R. 213 which clearly controls train speed to prevent derailments, did not intend to set forth a national maximum safe speed at all grade crossings. The Secretary intended only to regulate a perceived cause of derailments which were of particular concern to Congress due to the increased frequency in transporting hazardous materials. *Senate Report*, 91-619. No speed regulation exists in the C.F.R. addressing the same subject matter as the state common law which addresses maximum safe speeds through municipalities, across grade crossings and under hazardous conditions.

No conflict exists between the federal regulations and the state duties of care to reduce speed in a hazardous area and erect gate arms at a hazardous crossing. The railroad can easily comply with both the state and federal requirements. In fact, absolving the railroad of liability in tort would *create* a conflict. As the stated purpose of the FRSA is to prevent railroad related accidents, deaths and injuries, it would be counter productive to supplant the most effective method the law has ever developed for controlling negligent behavior; that being the state common-law.

ARGUMENT

I. GEORGIA'S COMMON-LAW DUTY OF DUE CARE WHICH REQUIRES A RAILROAD TO MAINTAIN A SAFE CROSSING IS NOT PREEMPTED BY FEDERAL LAW.

In determining whether state law is preempted, the Court must first determine Congress's intent in enacting § 434 of the Federal Railroad Safety Act. No preemption exists in absence of a clear intent by Congress to displace state law. Courts have traditionally been reluctant to preempt state laws in areas within the state police power *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 230, 67 S.Ct. 1146, 91 L.Ed.1447 (1947). A state tort law remedy is within this historic power. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 248 (1963). Accordingly, Respondent is entitled to an initial presumption in her favor that her claims against CSX are not preempted.

A. The plain language of the Federal Railroad Safety Act does not preempt Georgia's common-law duty of due care to erect gate arms at a hazardous crossing.

The *Federal Railroad Safety Act* (hereinafter referred to as the "FRSA") authorizes the preemption of state regulations of railroad safety in certain narrowly defined circumstances. 45 U.S.C. § 434 provides:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such

> time as the Secretary has adopted a rule, regulation, order or standard *covering the subject matter of such state requirement*. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard and when not creating an undue burden on interstate commerce. 45 U.S.C. 434 (Emphasis supplied)

Determination of Congressional intent is always the primary consideration in a preemption analysis of a federal statute. To accomplish this task, the Court historically "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" *FMC Corp. v. Holliday*, 498 U.S. ___, 111 S.Ct. 403, 112 L.Ed. 2d 356 (1990). Additionally, express preemption provisions are to be narrowly interpreted. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992).

Congress has clearly preserved state law in § 434. Three distinct provisions of the Act support this contention. First, Congress declared that the laws relating to railroad safety shall be nationally uniform "to the extent practicable". This language demonstrates Congressional recognition that the laws governing railroad safety cannot be completely uniform. Second, Congress expressly stated that states "may adopt, or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such state requirement."

The first part of this sentence clearly provides states with broad regulatory authority in areas of railroad

safety. The statute provides that states may "adopt or continue in force any law,. . . . . *relating to* railroad safety . . . ". Because the phrase "Relating to" is held to have a very broad meaning, *F.M.C. Corp.*, 111 S.Ct. at 407, it is clear that Congress intended a broad grant of regulatory authority to the states.

In this statement, Congress reaffirmed broad state power, then narrowed the preemptive reach of federal regulation. Congress narrowed the states broad regulatory authority only when the Secretary "adopts a rule, regulation, order or standard *covering the subject matter* of such state requirement".[3] Congress therefore, required the Secretary to adopt specific rules which cover the same subject matter as the state requirement before state law is preempted.

Congress then included an exception in § 434 which expressly allows state regulation when necessary to reduce or eliminate a local safety hazard.[4] Again, Congress preserved broad regulatory authority in the states by continuing any state regulation "*relating to* railroad safety when necessary to eliminate or reduce an essentially local safety hazard. . . . ".

Examination of the broad language, "relating to" used by Congress in the statute, clearly indicates that Congress intended a broad construction of the authority reserved to the states. In contrast, this broad language is

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[3] "Subject matter" is defined as "the subject, or matter presented for consideration; the thing in dispute" *Black's Law Dictionary*, 5th Ed.

[4] And when not incompatible with a federal rule and not placing an undue burden on interstate commerce.

not used in the preemption provision itself and so does not support the same broad construction.

To determine whether Respondent/Cross-Petitioner's claims are preempted by 45 U.S.C. § 434, this Court must decide (1) whether the duties imposed on CSX by Georgia's tort law cover the subject matter of a regulation adopted by the Secretary; and (2) if so, whether the Cook Street railroad crossing presents a "local safety hazard" which the state may still regulate. Since a finding of preemption in this case will displace the traditional police power of a state, the requisite analysis must be approached with a disposition that the state law is not preempted. *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed. 2d 86 (1989).

B. The legislative and regulatory histories of the Federal Railroad Safety Act and federal regulations relative thereto demonstrate no intent to preempt the common law duty of a Railroad to maintain a safe crossing.

The issues presented in the instant case are as old as the railroads themselves. A battle over the responsibility for grade crossing safety has raged since the railroad first appeared on the scene in the 1830's. When railroads were first built, states welcomed this new transportation and freely allowed the railroads to build their tracks across existing streets and roads at grade. This allowed the railroads to avoid the high cost of grade separations, but the railroad remained responsible for making their crossings safe. Inherent and consistent with such responsibility was (1) the duty to provide and implement safety devices; and (2) the duty to pay common law tort damages if applicable.

Despite imposing responsibility on the railroad, states maintained an active role in identifying crossings that needed improvement and required railroads to pay for all or part of the cost of improving a grade crossing. *Missouri Pacific Railway v. Omaha*, 235 U.S. 121, 35 S.Ct. 82, 59 L.Ed. 157 (1914).

As the automobile became more popular, more roads were built and traffic across railroads increased. Increasing grade crossing protection projects led Congress to authorize federal-aid highway funds to the state to help defray some of the expense. The *Federal Aid Road Act of 1916* required the states to match federal funds on a 50-50 basis. States could and usually did require the railroads to pay the state's share of the cost. *Rail Highway Crossings Study* (April, 1989, p.1-8).

In 1933 the *National Industrial Recovery Act* authorized another $300 million to the states to improve crossing safety. Again, Congress was unable to solve the problem because notwithstanding the infusion of federal money, the number of crossing accidents continued to increase in direct proportion to an increase in highway construction projects. From 1933 to 1970 three constants remained: (1) The states remained involved in identifying and monitoring grade crossing improvement projects, (2) The railroads remained responsible for full or partial funding and (3) The railroads remained liable for tort damages for loss of life or property proximately caused by their unsafe railroad crossings. All that federal law changed was that the railroad industry was provided some relief by federal appropriation for the high cost of grade crossing improvements.

Despite federal involvement, fatalities at grade crossings continued to increase and in response, the Congress

passed the *Federal Highway Safety Act* (FHSA) and the *Federal Railroad Safety Act* (FRSA). Together the two acts directed the Secretary of Transportation to study the grade crossing problem, make recommendations for appropriate action and recommend how the improvements should be funded. Two reports to Congress were prepared by the Secretary of Transportation in response to the mandates of the FRSA and the FHSA, to wit: *Reports to Congress, Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem,* (November, 1971) and *Part II: Recommendations for Resolving the Problem,* (August, 1972). Because the decision of whether state law is preempted under the FRSA turns on the intent of the Secretary of Transportation, *FMC Corp. v. Holliday,* 498 U.S. ___, 111 S.Ct. 403, 112 L.Ed. 2d 356 (1990), *Fidelity Federal Savings & Loan Ass'n v. Le La Cuesta,* 458 U.S. 141, 102 S.Ct 3014, 73 L.Ed.2d 664 (1982) as well as the intent of Congress, the two reports are probative of the issues presently before the Court.

In 1989, the Secretary of Transportation, in a report to Congress on grade crossing safety, made a number of statements that are wholly inconsistent not just with petitioner's position but with the Solicitor General's as well. For example, the Secretary flatly stated that "in most cases, the courts still hold the railroad responsible for crossing accidents," U.S. Department of Transportation, *Rail-Highway Crossings Study: Report of the Secretary of Transportation to the United States Congress* at 3-1 (April 1989). If the Secretary had sought to change that state of affairs, in whole (as Petitioner says) or in important part (as the Solicitor General says), surely the Secretary would have informed Congress of what she thought she had done.

Similarly, the Secretary's Report to Congress states:

> Accident liability costs are a significant and escalating concern. . . . From a future program standpoint, liability costs can best be addressed and, it is hoped, reduced through improved levels of devices at crossings, and the achievement of maximum effectiveness from the system components.

Id. at 4, 7-6. If the Secretary had sought to "address[]" and "reduce[]" liability costs through preemption, surely she would have mentioned that as an aspect of the "future program." But she said nothing of the kind.

Until recently railroads were allocated a portion of the cost of federally funded grade crossing improvements equal to the "*net* benefit [they] received" *Rail Highway Crossings Study,* (April, 1989, p.1-7) (Emphasis added). Petitioner repeatedly asserts that because they are no longer responsible for paying any portion of the improvement the Secretary has determined that the railroad does not benefit from crossing protection. In fact, the opposite is true. In deciding that there was no *net* benefit, the Secretary assumed that railroads would be held liable for accidents and that reducing the number of accidents would benefit the railroads. The Secretary concluded, however, that that benefit was "offset".

> Railroad benefit from the installation of train activated devices can be measured in terms of the anticipated reduction in grade crossing accidents. This in turn brings about some reduction in the cost of *claims for personal injuries, fatalities, and vehicle damage* resulting from accidents which otherwise may occur at the crossing. (Emphasis added)
>
> . . . .

> Analysis of data available indicates also that the average claim payment made by the railroads as the result of an accident at a crossing with modern automatic protection is substantially less than the average claim payment resulting from an accident at a crossing with ordinary passive crossbuck protection. Report to Congress, *Railroad Highway Safety Part II: Recommendations for Resolving the Problem*, at 103 (August, 1972)

At the time of the Secretary's 1972 study, railroads were responsible for paying a sum equal to the net benefit received from the federally funded improvement; up to 10% of the total cost. If the State does not plan to use federal money however, it may require a larger payment from the railroad. *Rail Highway Crossings Study, Report of the Secretary of Transportation to the United States Congress*, at 3-1 (April, 1989).

In calculating the "net benefit" to the railroad, the Secretary recognized that the responsibility for *maintaining* grade crossing devices, in most cases, is solely the railroad's.[5] *Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving the Problem*, at 27 (August, 1972). Further, the Secretary took into consideration that this maintenance cost usually offset the benefit that the railroad received in reduced tort liability:

> In broad perspective, the aggregate annual cost to the railroads for maintenance and operation of grade crossing protection and for providing watchmen is already substantially more than the annual cost of death and personal injury claims

[5] Georgia places the entire responsibility of maintaining railroad crossing improvement devices on the railroad *Report to Congress: Part II* (August, 1972, p.21)

> resulting from grade crossing accidents. *Id.* at 103.

The railroad is no longer required to share in the cost of a federally funded improvement because that cost is greater than total tort liability. The fact that the railroad remains liable in tort leads to the conclusion that there is no "net benefit" to the railroad.[6]

Aside from considering tort claims in calculating the "net benefit" to the railroad of federally funded crossing improvements, the Secretary has continuously recognized a value in state tort law remedies for accomplishment of Congressional objectives of promoting safety. In discussing continued railroad involvement in safety projects the Secretary explained that because the railroad pays about $21 million a year in personal injury and death claims, a "continuing interest on the part of the railroads in bringing about a reduction in grade crossing accidents" is justified. *Id.* at 103. The Secretary stated the obvious, that so long as railroads are liable for unsafe crossings, their interest in improving these crossings will continue. The railroad's interest in improving safety is essential to a workable program because success requires their cooperation.

The Secretary set forth several conclusions relative to the grade crossing problem. First, deaths and injuries at grade crossings continue to escalate, but *decrease* when federal aid is available to improve the crossings. Second,

[6] Railroads must still share in the cost of grade crossing elimination projects however. *Id.* at 104. Where grade crossings are completely eliminated by the construction of an overpass or underpass there is no maintenance cost to the railroad. Therefore, the railroad benefit of reduced tort liability is not offset where these crossings are completely eliminated.

because of the nature of grade crossings, improvement projects must be a *joint effort* between states, railroads and local governments as all three entities have a stake in the crossing. Third, the past federal legislation had served its purpose but there was still no coordinated effort to resolve the problem.

Congress addressed these issues in its traditional manner; by providing funds, guidance and coordination. To promote a coordinated effort, Congress vested the authority to oversee the project in the Secretary of Transportation.

Because federal funds are apportioned to the several states, the states assume responsibility for programming crossing improvement projects to receive the money. Railroads are responsible for design, construction and maintenance of the improvements on their right of way. The federal role is "one of overseer to ensure that federal dollars are appropriately spent". *Id.* at 3-2, 3-3. (*Railroad Highway Safety, Part I: A Comprehensive Statement of the Problem* (November, 1971) and *Part II: Recommendations for Resolving the Problem* (August, 1972)).

In both reports to Congress, the Secretary identified as problems the lack of consistent signing at railroad crossings and the existence of differing local traffic laws relating to a motorist's duty. *Part I, Id.* at p.55. Concern over non-uniformity of traffic control devices led to the first publication of the *Manual on Uniform Traffic Control Devices* (hereinafter referred to as MUTCD). *Id.* at 59. In the case of train activated warning devices, motorists were not receiving a uniform warning time at train approach. *Id.* p.62. There was also no coordinated effort to gather accident statistics which would help

identify the hazards that prompt grade crossing accidents. *Part II, Id.* at p.58.

Congress responded to these inconsistencies by enacting 45 U.S.C. § 434 which proposes that "laws . . . relating to railroad safety shall be nationally uniform to the extent practicable". Upon a reading of this Section in light of the Secretary's reports, it becomes clear that Congress was addressing uniformity of warning devices and uniformity of laws regulating a motorist's duty at crossings. The Secretary constantly emphasized the importance of driver response to traffic control devices and the problem with differing traffic laws. A motorist must be able to immediately recognize the sign or signal ahead, know its meaning and know his required response. The uniformity of the signal increases motorist awareness of the hazard ahead. Uniform laws regulating the motorist's response to that signal promote a shorter decision making process. Uniformity of signals and laws therefore promote safety by increasing predictable driver behavior.

The phraseology of § 434 of the FRSA was not intended to preempt state tort remedies for negligent acts and omissions by a railroad with respect to grade crossings for which the railroad is responsible. Nor does the language of § 431 which authorizes the Secretary to "prescribe as necessary, appropriate rules, regulations, orders, and standards for *all areas of rail safety*" intend to state a preemptive purpose.

Congress included this language to ensure that the FRSA would reach as far as the commerce clause would allow rather than be limited to common carriers engaged in interstate commerce. Older safety statutes had only applied to common carriers engaged in interstate and

foreign commerce by rail. In the House Committee Report the term "all areas of railroad safety" was explained as follows:

> This legislation is intended to encompass all those means of rail transportation as are commonly included within the term. Thus 'Railroad' is not limited to the confines of 'common carrier by railroad' as that language is defined in the Interstate Commerce Act". H.R. Rep. No. 91-1194, 91st Congress, 2nd Sess. at 16 (1970) *See Also* "The Extent and Exercise of FRA Safety Jurisdiction" at 49 C.F.R. Ch. II (10-1-90 edition) p.36.

Accordingly, Congress did not intend use of the phrase "in all areas of railway safety" in a preemptive context. The phrase is further defined in 45 U.S.C. § 431(k) which provides that "the term 'all areas of railroad safety' includes the safety of commuter or other short-haul rail passenger service in a metropolitan or suburban area, including any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979".

To support its argument that "all areas of railroad safety" carries an implicit grant of preemptive power, Petitioner cites the Court to selected language contained in the House Reports without regard to context. In the report "The Role of the State in Rail Safety", Congress debated the proper role of the state regulatory commissions in enforcing federal regulations. The states were urging Congress to permit them to enforce federal regulations but Congress was unwilling to do so except to the limited degree permitted under 45 U.S.C. § 436. *Id.* at 4117-4119. From this debate, Petitioner extracts language relative to Congressional concern over "subjecting the

national rail system to a variety of enforcement in 50 different judicial and administrative systems" *id.* at 4108, 4109. (See Pet.Brief, p.7, p.18, p.41). Congress was addressing *who* would be responsible for enforcing the *federal* rules, not *what* rules would be enforced. By taking matter out of context Petitioner creates the impression that Congress was concerned with differing laws or standards, when in reality, Congress was concerned only with differing and multiple enforcement agencies. H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess., (1970).

In concluding that Congress did not intend to preempt the field it is important to note the stated purpose of the FRSA; to wit:

> The purpose of this Act is "to promote safety in all areas of Railroad operations and to reduce Railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials" 45 U.S.C. § 421

Additionally, the Secretary noted that continued tort responsibility insures the railroad's continued interest in "bring[ing] about a reduction in grade crossing accidents" *Report to Congress: Railroad Highway Safety, Part II: Recommendations for Resolving the Problem* at 103 (August, 1972).

The clear and unambiguous language of the FRSA, its legislative history and common-sense dictate the conclusion by this Court that Congress never intended to broadly preempt the entire field of railroad safety. Congress meant what it said and said what it meant: only when the Secretary adopts a rule covering the subject

matter of the state requirement does the state law give way.[7]

C. There is no Federal rule, regulation, order or standard covering the "subject matter" of when a railroad must erect gate arms at a hazardous crossing.

To determine whether the Secretary has adopted a rule regulating the same "subject matter" as the state requirement, the state requirement at issue must first be defined. At issue in the instant case is the historical duty which Georgia's common-law imposes on a railroad, to wit; the duty to erect gate arms at a hazardous crossing. In order to determine whether this common law duty falls within the same subject matter of an area presently regulated by the Secretary, an analysis must be made of the relevant federal statutes, regulations and standards. Petitioner contends that several sections of the *Code of Federal Regulations* cover the subject matter of the state requirement. Analysis of each regulation separately establishes that the Secretary has not promulgated a pre-emptive regulation in the area of a railroad's duty to erect gate arms.

Petitioner first relies on 23 C.F.R. 646. Section 646 states as its purpose the following:

> (a) The purpose of this subpart is to prescribe policies and procedures for advancing *Federal-aid projects* involving railroad facilities.

[7] And not even then if the state law is addressing a "local safety hazard".

> (b) This subpart and all references hereinafter made to "projects" applies to Federal-aid projects involving railroad facilities including projects for the elimination of hazards or railroad highway crossings, and other projects. . . .
>
> 23 C.F.R. 646.200 (Emphasis added)

This stated purpose of the regulation clearly provides that its mandates are *only* applicable to federally funded projects[8]. This federal regulation does not relieve a railroad of its duty to install gate arms at a hazardous crossing.

Petitioner is correct in contending that § 646 requires uniform standards for implementing devices installed with federal aid. Section 646.214(b) states however, that "[a]ll traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways *supplemented to the extent applicable by State standards*" (Emphasis added).[9]

Petitioner also cites § 646 for the proposition that the selection of traffic control devices is the *sole* responsibility of the state agency with jurisdiction over the crossing. That statement is directly contradicted by the express language of the regulation. Section 646.214(4) states that "[f]or crossings where the requirements of 646.214(b)(3) (describing adequate warning devices for federal aid projects) are not applicable, the type of warning device to be installed, whether the determination *is made by a State*

[8] This conclusion is also urged by the Solicitor General as Amicus Curiae at p.19.

[9] By expressly allowing state law to supplement the federal regulations, the Secretary demonstrated a recognition that these regulations do not cover the entire "subject matter" of grade crossing safety nor do the Federal Regulations "occupy the entire field" of railway safety.

regulatory agency, State highway agency, and/or the railroad is subject to the approval of FHWA" (Emphasis added). This section unequivocally demonstrates the Secretary's recognition that the railroad would continue to be involved in the decision making process.[10]

Petitioner relies also on 23 C.F.R. 655.601 and .603. These sections require states to schedule improvement projects on a priority based index to receive federal funds. They do not require the states to decide which crossings will be made safe. Again, one must look to the stated purpose of this section:

> To prescribe the policies and procedures of the Federal Highway Administration (FHWA) to obtain basic uniformity of *traffic control devices* on all streets and highways in accordance with the following references that are approved by the FHWA for application on *Federal-aid projects*. (Emphasis added).

To obtain "basic uniformity of traffic control devices" the Secretary adopted the MUTCD as the national standard "for application on any highway project in which Federal highway funds participate . . . " § 655.602(a). As recognized by this section, the MUTCD's primary function is to provide uniform signalization, not uniform national law.

Petitioner also relies on 23 C.F.R. 924.7-11 and § 1204 which require states to implement a program to study their crossings and improve safety. Section 924 requires

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[10] Respondent's contention in this regard is furthered by the Solicitor General at p.13 of his brief as Amicus Curiae where he states that the Secretary of Transportation has never construed the law as vesting the state agencies with the exclusive duty to determine the need for and selection of grade crossing devices.

states to prioritize their grade crossings based on a hazard index formula as a prerequisite to the receipt of federal funds; § 1204.4 sets forth guidelines aimed at reducing *all traffic accidents*. Petitioner concludes that because Georgia is required to prioritize these crossings, railroads are no longer responsible for determining when a crossing is hazardous.

Reading and analyzing these regulations, however, simply indicates that the Secretary wanted states participating in federally funded programs to study their own grade crossing problems and set up a priority list for those eligible for federal funds. For states participating in the federally funded program, § 655 requires adoption of the national standards of the MUTCD to ensure uniform devices and that federal funds are well spent.

The MUTCD is an engineering manual adopted by the Secretary to provide guidance to state and railroad traffic engineers. It was not designed to supplant state law and insulate railroads from liability. If the Secretary decided to exercise the authority to preempt state law, surely these preemptive regulations would be found somewhere other than in the broad language of an engineering manual.

"Other than the requirements for installation of certain passive control devices (crossbuck, advance Warning Sign, and certain pavement markings) at all public railhighway crossings, there are no warrants in the MUTCD to specify the installation of certain devices at crossings with certain characteristics" *Rail Highway Crossings Study; Report of the Secretary of Transportation to the United States*

Congress (April, 1989) p.4-8.[11] The MUTCD recommends that the decision of which type of traffic control device to be used, should rest on an engineering and traffic investigation made by a diagnostic team. This diagnostic team consists of, at a minimum, a highway traffic engineer and a *railroad signal engineer. Id.* at 4-9 (Emphasis added). After this evaluation "the determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority" MUTCD, 8A-1.

In *Marshall v. Burlington Northern*, 720 F.2d 1149 (9th Cir. 1983), and *Hatfield v. Burlington Northern Railroad Co.*, ___ F.2d ___ (1992) § 8A-1 of the MUTCD was erroneously construed as giving the public agency the exclusive duty to select the device to be installed. The Secretary herself, does not interpret this statement in the MUTCD as giving the local jurisdiction exclusive authority over the selection of traffic control devices:

> Often the highway engineer *and the railroad engineer will share responsibility at the grade crossing.* The extent of their responsibilities *will vary depending on State laws and practices;* however, *both* must be involved in the decision making process and *both* must have an understanding of the interaction between train, motor vehicle and control devices. ("D.O.T. Handbook" at 8A, Emphasis Added). (See also p.13 of the Solicitor's brief as Amicus Curiae)

Petitioner urges this Court to adopt the *Marshall* and *Hatfield* Courts' construction, a construction contradicted

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[11] The Solicitor General also argues that there are no standards in the MUTCD which "purport generally to determine the circumstances in which a particular safety device is needed" (See p.21 of the Solicitor's brief as Amicus Curiae)

by the Secretary in the DOT Handbook expounding on the MUTCD, and by the language of the provision itself. 8A-1 of the MUTCD reads in *full*:

> The highway agency and the railroad company are entitled to jointly occupy the right of way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority. Subject to such determination and selection, design, installation and operation shall be in accordance with the national standards contained herein.

The MUTCD is a federally mandated manual. This provision delineates the relationship between state and federal agencies. It simply provides that the responsibility for selecting traffic control devices is not a federal function. Other sections of the MUTCD support this contention. Immediately preceding 8A-1, the MUTCD provides:

> With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right of way in the conduct of their assigned duties. This requires joint responsibility in the traffic control functions between the public agency and the railroad.

Section 8D-1 of the MUTCD further provides:

> Based on an engineering and traffic investigation, a determination is made whether any active traffic control devices are required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval is required

from the appropriate agency within a given state.

If only the state had jurisdictional authority to determine a need for and select the proper safety device at a grade crossing, there would be no need to require approval by the state before an installation could be undertaken. The language of the MUTCD clearly contemplates railroad requests for improved crossing protection. Granted, if the state refused to allow the railroad to improve crossing protection, the railroad might well have an excellent defense to a state tort claim based on a duty to upgrade the crossing. This qu stion, which is not presented by the instant case, is a question of state tort law, not one of federal preemption.

The statement in the MUTCD which permits the agency with jurisdiction over the crossing to select the device used, merely "describes the process that has long governed the selection of traffic control devices" (Brief of Solicitor General at p.23). The Secretary in the D.O.T. Handbook recognizes this longstanding procedure.

> It is important to remember that several agencies, both public and private can be involved when improvements are considered at a railroad highway grade crossing. These include:
>
> * The railroad,
> * The State agency responsible for regulating railroad highway grade crossings,
> * The agency responsible for the roadway crossing the railroad (state, county or city)

("D.O.T. Handbook", 8A-6)

The Secretary also recognizes the longstanding principal of tort liability.

> Liability for accidents occurring at grade crossings is governed by the law of negligence. The

> law imposes upon states and railroads the duty to exercise reasonable care to avoid injury to persons using the highway. States and railroads are under no duty to provide absolute safety.
>
> . . .
>
> It has been suggested that agencies and railroads could *significantly reduce tort liability* suits involving traffic control devices by implementing four basic principals.
>
> Know the laws relating to traffic control devices,
>
> Conduct and maintain an inventory of devices,
>
> Replace devices at the end of their effective lives,
>
> Apply approved traffic control device specifications and standards.

("Railroad Grade Crossing Safety Handbook", p.27) (Emphasis added)

Properly construed, the MUTCD not only *does not support* a contention of federal preemption, but actually compels the opposite conclusion.

The federal regulations and the MUTCD contain broad statements best described as guidelines for deciding how to prioritize crossings and qualify for federal funds. Congress never intended these *broad* statements to preempt the entire field of railroad safety. A congressional hearing addressing federal and state roles under the FRSA states:

> *[t]o avoid a lapse in regulation* . . . the states may adopt or continue in force any law, rule, regulation or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation, or standard covering the subject matter of the state requirement. *This prevents the*

mere enactment of a broad authorizing Federal statute from preempting the field . . . "[12]

Congress was attempting to prevent the very argument propounded by Petitioner; that the "mere enactment of a broad authorizing Federal statute" preempts the entire field.

Absent a specific federal regulation covering the *same* "subject matter" of the state requirement, there is no preemption. There is no federal regulation specifically stating under what conditions gate arms should be placed at a particular crossing. Neither do existing federal regulations set forth a federal remedy designed to replace state tort law. Petitioner's construction of the foregoing would leave citizens injured and killed at railroad crossings as a result of negligence by the railroad, the very citizens whom Congress sought to protect, without a remedy.

D. There are no federal laws, rules, regulations or standards relating to grade crossing safety which imply preemption.

i. There is no federal scheme of legislation that occupies the field of grade crossing safety.

If state law is not expressly supplanted it must be clear that Congress intended the federal regulation to exclusively occupy the field before preemption will be implied. *Consolidated Rail v. Smith*, 664 F.Supp. 1228 (N.D. Ind. 1987), citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S.

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[12] *Railroad Safety and Hazardous Materials Control: Hearings on H.R. 7068, H.R. 14417, H.R. 14478 and S. 1933*, 91st Cong. 2nd Sess. 51 (1970). *See also, Missouri Pacific Railroad v. Railroad Comm. of Texas*, 850 F.2d 264 (1988). (Emphasis added)

238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984). Three of the four Courts of Appeal addressing the question, have found that the FRSA does not occupy the field. *Karl v. Burlington Northern*, 880 F.2d 68 (8th Cir. 1989), *Marshall v. Burlington Northern*, 720 F.2d 1149 (9th Cir. 1983), *Easterwood v. CSX Transportation Inc.*, 933 F.2d 1548 (11th Cir. 1991).

The Secretary was authorized to prescribe rules regulations or standards "supplementing provisions of law and regulations in effect" as of the date of enactment. 45 U.S.C. § 431(a). The regulations found in the C.F.R. addressing prioritization of federally funded projects are not so "comprehensive" as to imply that Congress or the Secretary intended to do more than supplement the existing law. The Secretary was also authorized to expressly preempt state law by "covering the [same] subject matter". In 49 C.F.R. 225.1 which regulates accident/incident reporting requirements, the Secretary exercised the authority to preempt state law. 49 C.F.R. 225.1 provides that: "[i]ssuance of these regulations under the Federal Railroad Safety Act pre-empts States from prescribing accident/incident reporting requirements."[13] No regulation expressly preempts the subject matter of grade crossing protection. Although preemption can occur regardless of whether the Secretary uses the word "preempt", the absence of preempting language in one area and the presence of preempting language in another should be considered by the Court in determining the Secretary's intent.

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[13] See also § 646.210 expressly preempting state laws requiring railroads from sharing in the cost of federal aid projects.

ii. Georgia's common law duty of care does not conflict with nor stand as an obstacle to federal objectives.

Preemption also exists where the state law conflicts with the federal law to a point where it is impossible to comply with both. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 248 (1963). Petitioner can comply with Georgia's duty to erect gate arms at a hazardous crossing and all federal requirements of 49 C.F.R.. Petitioner argues that it is unable to comply with the state duty because the MUTCD gives the ultimate decision of crossing protection to the "public agency with jurisdiction over the crossing". There is no factual or legal support for the contention that the railroad could not improve the Cook Street grade crossing.

Archie Burnham, a Georgia State DOT Traffic and Safety Engineer, testified that the Railroad would occasionally ask for improvements at crossings not on the priority list. The Georgia D.O.T. would approve those installations. (Depo. of Burnham, p.58, l.16-25). Nothing in the federal law prevents such a request. Nothing in the federal law prevents Petitioner from paying the full cost of such improvement should the installment be approved, but federal funds not available.

This is what Justice Kennedy concluded in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) at 1154 wherein he wrote that "until a federal decision is reached through the local agency on the *adequacy of the warning devices* at the crossing, the Railroad's duty under applicable state law to maintain a 'good and safe' crossing is not preempted". (Emphasis added). Justice Kennedy never held that state common law is preempted if a state declines to use federal funds. *Marshall* held only that

when a federal decision is made on the *adequacy of the warning devices*, is state law preempted. Accordingly, the holding in *Marshall* is not determinative when the decision to erect or not erect gate arms is based on financial constraints.

Marshall does not bar the claim presently before the Court because there has never been a federal decision that the warning device at Cook Street was adequate. In fact, the opposite conclusion was reached. All parties, including the railroad, knew that gate arms were needed at the Cook Street crossing. (Depo. of Burnham, p.44, l.16-25). The Georgia D.O.T. approved gate arms at this crossing and the City of Cartersville agreed that they were needed. Problems arose with the design of the system (Depo. of Burnham, p.60, l.5-14). To accommodate the large truck traffic at the crossing, either islands or a different type of gate arm had to be installed. (Depo. of Burnham, p.60, l.5-14). This required the railroad to raise their communication lines which they did not report back as completed until several years later when yet another fatal accident occurred (Depo. of Burnham, p.61, l.2-6). Due to the sluggishness in the line and difficulties from the railroad side, the project was not moving. (Depo. of Burnham, p.62, l.13-16). Therefore, the Georgia D.O.T., afraid of losing money which had been earmarked for this project, transferred the funds to an active one. (Depo. of Burnham, p.62, l.13-22, p.63, l.20-25). This does not constitute a decision by the Georgia DOT that the crossing protection at Cook Street was adequate. Further, the Railroad not only was not foreclosed from improving this crossing, it was actually encouraged to do so.

Only when a federal decision is made that would preclude a railroad from installing gate arms would the

federal and state laws conflict. Only then would the railroad be put in a position where it could not comply with both laws. A decision by the state based on the absence of funding, as opposed to safety, does not preclude the installation of gate arms through other resources.

The Solicitor General fails to recognize this fundamental principal. The Solicitor would hold that because § 646.214 directs that automatic gates be installed on federal aid projects when the crossing has certain characteristics, once a crossing is updated with federal funds it is adequately protected. This argument is totally unworkable. Georgia is given a certain amount of money each year to improve grade crossings. The decision of whether to install gate arms or automatic lights frequently rests on financial constraints as opposed to what is "adequate".

But this argument misapprehends the scope of Section 646.214. That regulation "covers the subject matter" not of when railroads must use gate arms, but of *how federal funds are to be spent*. CSX recognizes (Br. 21-22 & n.9) that the "subject matter" of a federal regulation is determined by the function it serves. For example, CSX acknowledges that federal safety standards do not "cover the subject matter" of compensation, but only of punishment. Br. 21-22 & n.9. Section 646.214 is designed to ensure that federal funds are spent in a way that advances federal purposes. Nothing in the regulation or its administrative history suggests that the states, by accepting federal funds, agree not to enforce standards of due care that exceed federal requirements. By CSX's own logic, therefore, Section 646.214 only covers the subject matter of how federal funds are spent, and under the plain terms of Section 434 it does not preempt state tort law duties.

Nor does the duty to pay tort damages conflict with the federal goal of promoting safety. *Silkwood v. Kerr-McGee Corp*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed. 2d 443 (1984), (holding that the two laws did not conflict because it was not physically impossible to pay both the state damages and the federal fines).

Paying tort damages may use railroad funds that could be used to improve crossing safety. Tort liability, however, does not frustrate Congressional objectives to improve safety, it enhances them. If state tort law is preempted, railroads will have no incentive to improve safety at crossings. The FRSA and the regulations promulgated pursuant thereto recognize this fundamental fact.

II. GEORGIA'S COMMON LAW DUTY OF DUE CARE WHICH REQUIRES A TRAIN TO REDUCE ITS SPEED IN A HAZARDOUS AREA IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT.

Section 434 of the FRSA does not preempt a common law action against a Railroad for negligent failure to reduce its speed. This conclusion is compelled by analysis of the single federal regulation that addresses the speed of trains. 49 C.F.R. 213.9 sets forth maximum speeds that a train can travel depending on the type of train and the track class. Cross-respondent contends that this regulation preempts all state and local speed regulations and insulates them from liability. Cross-respondent concludes that it may travel 60 miles per hour on the track crossing Cook Street in Cartersville, Georgia because it is a class 4 track.

Even though federal and state law both address speed, the analysis does not end here. The question is whether these two requirements cover the *same* "subject

matter". If the two requirements do not cover the *same* "subject matter", the express preemption provision of 45 USC § 434 does not apply. As we are again dealing with the state common law, (a traditional state interest) the intent to preempt must be clear and unmistakable. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Cross-petitioner is again entitled to the presumption that her claims are not preempted and Cross-respondent again bears the burden of showing a clear intent by Congress and the Secretary of Transportation to the contrary. The regulation itself and its legislative history clearly demonstrate that the Secretary never intended to preempt the state speed requirements.[14]

A. Georgia's common law does not cover the same subject matter as 49 C.F.R. 213.9.

Before it can be determined whether the state and federal law cover the same "subject matter" the state requirement must be defined. At issue in the present case is the duty of a railroad to reduce its speed in a hazardous area to prevent railroad crossing accidents. Also at issue is the duty of a railroad to provide compensation to tort victims. Nothing in 49 C.F.R. 213 covers the subject matter of these state requirements.

The section of the C.F.R. relied on by Respondent is entitled "*Track* Safety Standards" (emphasis added). This section does not address "crossing safety" but in fact states a very limited scope:

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[14] As we are dealing with a federal regulation, Respondent's burden is even greater under this Court's decision in *Schneidewind v. ANR Pipeline*, 108 S.Ct. 1145 (1988) holding that regulations normally do not preempt state authority unless they do so with some specificity.

> This part prescribes initial *minimum* safety requirements for *railroad track* that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific *track conditions* existing in isolation. Therefore, a combination of *track conditions*, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that *track*. § 213.1 (emphasis added).

The foregoing demonstrates that the Secretary was addressing conditions pertaining to the *track* itself. The foregoing also demonstrates recognition by the Secretary that the requirements of the section do not necessarily make operations safe. Section 213 shows a clear intent to regulate only the safety of the *track and the rails*. Nothing in § 213 regulates safe operations over grade crossings, through municipalities, or in the face of hazardous conditions. Nothing in § 213 addresses safe operations in dangerous weather conditions, safe operations in heavily populated areas, or safe operations through areas with hazardous grade crossings. This regulation merely provides a *maximum* speed based on factors such as the track geometry, (§ 213.51) track structure, (§ 213.101), the number and quality of crossties (§ 231.109) and the proper maintenance for a defective rail (§ 213.212). Other sections address track appliances and track related devices (§ 213.201) and require periodic inspections (§ 213.231). The condition of the track gives rise to the track classification. The track classification gives rise to the maximum allowable speed. (§ 213.9). A reading of this section clearly demonstrates that the Secretary was addressing how fast a train can travel and not derail. This conclusion is supported by two lower court decisions. See *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861 (Kan. 1986), *Southern Pacific Transportation Co. v. Maga*

Trucking Co., 758 F.Supp. 608 (D.C. Nev.1991) (holding that § 213 was for the safety of *trains*). It is also supported by legislative history.

i. In adopting 49 C.F.R. 213 the Secretary was addressing the safety of trains and the hazards of derailment.

Senate Report 91-619 discussed the intended scope of the FRSA. An understanding of the Congressional concerns is essential to an understanding of the Secretary's actions. Senate members discussed the accidents prompting the FRSA and prompting the authorization of the Secretary's regulatory power. The lack of minimum standards governing the railroads caused numerous railroad employee injuries and deaths. The use of railroads in transporting hazardous materials posed a new danger in the case of derailments.

The basic thrust of the testimony in a voluminous hearing record is that the unsafe conditions which persist on some railroads are very serious, particularly in view of the fact that with the introduction of higher speed, longer and heavier trains, the increased carriage of deadly and dangerous materials, the possibility of a major catastrophe is ever present.. . . . .

Railroads today, as well as other carriers, are transporting extremely flammable explosives, highly reactive and poisonous substances throughout the Nation's metropolitan areas and countrysides.. . . . . .

Increased accidents, greater speeds, and more hazardous shipments provide an extremely lethal combination so that with increased frequency, train wrecks threaten whole communities with flame explosions, and contamination by poisonous chemicals. (Senate Report: 91-619)

The report went further to cite a number of recent derailment accidents. The report cited a case where one car derailed in a 98 car train triggering a general derailment of an oncoming passenger train which resulted in spillage of poisonous cargo, a resulting 10 hour fire that destroyed a cannery (the city's major industry) and the destruction of seven homes. The entire town was evacuated for two days and the town's water supply was polluted with cyanide for two months after the accident. The report cited "inadequate track maintenance which left [a] joint unsupported" as the cause for the broken rail that prompted the derailment. Senate members noted that a $50.00 repair could have prevented this catastrophe.

Members cited several other derailment accidents noting that between August, 1964 and May, 1969 thirty-nine communities were evacuated as a result of derailments of trains carrying poisonous cargo. The Senate recognized that two-thirds of all railroad accidents are derailments. These derailments "are largely attributable to *track* and equipment problems" (emphasis added). The Senate noted an absence of federal regulations covering the track and roadbed.

Section 213 regulates a perceived cause of derailments, the *track conditions*. Section 214 sets forth rules for how fast a train can travel across a certain *quality* track to prevent a possible derailment. The Secretary did not intend these speed regulations to govern the speed of a train at a grade crossing. Supporting this contention is a section of the Secretary's 1972 Report to Congress subheaded *Railroad Operating Costs* where the Secretary addressed the value of entirely eliminating some grade crossings:

> *Railroad Operating Costs* – The Association of American Railroads provided data from one major railroad company showing the cost and time involved in decelerating and accelerating

trains. The costs include additional fuel consumed and repair costs allocated to fuel costs, as well as brake and wheel wear costs. The Association also provided information from three other major railroad companies regarding both the number and magnitude of *speed changes required because of speed restrictions imposed on railroad operations by municipal ordinances or other governmental regulation for tracks crossing streets and highways at grade. It is assumed that these restrictions would be removed in each area where all grade crossings along a given rail line were eliminated.* Expanding this limited data by using a gross ton-mile factor, indicates an estimated operating and delay cost to railroad companies of as much as $75 to $100 million per year for decelerating and accelerating trains through urban areas where speeds are restricted by local ordinance or other regulation. *Report to Congress: Railroad Highway Safety Part II: Recommendations for Resolving the Problem.* p.38 (August, 1972). (Emphasis added).

The Secretary recognized in this report that local ordinances and other state speed restrictions would remain in effect where appropriate, including at grade crossings. If grade crossings were completely eliminated, speed reductions necessitated by grade crossings would be eliminated as well. The duty to regulate speed so as not to operate a train in a negligent manner would not be eliminated.

Cross-respondent argues that § 213 reflects the Secretary's determination to preempt state tort law, so that the railroad would not be negligent as a matter of law as long as its speed did not exceed 60 mph on a class 4 track. This construction is bizarre and insupportable. It converts a regulation addressing track quality and train speed and aimed at controlling derailments into a grant of immunity

from liability for negligent or even reckless operation of the railroad.

Section 213 does not insulate the railroad from liability when it recklessly fails to reduce speed in the face of hazardous conditions. Does the railroad have no duty to slow down when it knows a stalled gasoline tank truck is blocking a crossing? May a locomotive travel at 60 mph regardless of dense fog and pouring rain over multiple grade crossings and through the heart of a large city? Would a regulation so providing promote safety and reduce accidents?

Section 213 regulates track quality and concomitant speed. It is directed at preventing derailments and the injuries they cause to railroad employees and to the public. It does not and could not reasonably establish a national minimum "safe" speed.

ii. Since the Secretary was not addressing the same "safety concerns" as the state requirement, the same "subject matter" is not covered.

A federal regulation addresses the "same subject matter" of a state requirement *only* if both regulations address the same safety concerns. *Burlington Northern Railroad Co. v. Minnesota*, 882 F.2d 1349 (8th Cir. 1989), *Southern Pacific Transportation Co. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D. Cal. 1986). Because the State requirement to reduce speed in a hazardous area does not address the same safety concerns as the Secretary in § 213, the FRSA's express preemption provision is not triggered. Because this is an express preemption case, the Court's inquiry should "begin and end with the statutory framework itself" *Gade v. National Solid Wastes Management Ass'n*, ___ U.S. ___, 112 S.Ct. 2374, ___ L.Ed.2d

___ (1992) (quote from dissent at p.2390). But even if this Court goes further to address whether preemption is implied, the state tort law duties at issue are not preempted.

B. 49 C.F.R. 213 does not imply preemption.

Section 213 sets forth *minimum safety requirements*. No federal regulation sets forth mandatory speed regulations. No federal regulation provides compensation to victims of the railroad's failure to reduce its speed in hazardous areas. Nor does any federal regulation approve a minimum or a maximum train speed based on factors such as of the number of grade crossings, the population of the area or the physical relationship between the railroad line and the city through which it passes. In short, no comprehensive scheme of federal regulation of train speed exists.

Georgia's duty of care which requires simply that the railroad not be negligent in regulating speed of trains does not conflict with nor stand as an obstacle to the objectives of Congress. The traditional test of whether state and federal law conflict, is whether or not it would be impossible to comply with both. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 248 (1963).

Florida Lime held that the test of whether a state standard must give way to a federal regulation is "whether both regulations can be enforced without impairing the federal superintendence of the field". *Id.* at 142. In *Florida Lime*, a California statute gauged the maturity of avocados by oil content, requiring no less than 8 percent oil in any avocado for sale in California. A federal marketing order gauged the maturity of an avocado by a standard unrelated to oil content. The avocado growers

challenged the state requirement under federal preemption. This Court noted that the statutes were different but held that there must be an actual conflict before the State law will be preempted. The test set forth by this Court in *Florida Lime* is whether compliance with both laws would be physically impossible. This Court provided an example of preemption noting an actual conflict if the Federal order forbade the picking of an avocado of more than 7% oil and the California Statute excluded from state sale any avocado with less than 8% oil.

In the present case, the Secretary of Transportation has adopted a rule which allows a train to travel no more than 60 miles per hour on a class 4 track. The State common-law requires that a train reduce its speed when a reasonable man would do so. There is no conflict between these two standards. Trains can easily comply with both the federal and the state standards. If Georgia were to require trains to travel *no slower than* 70 miles per hour through its borders, and federal law set a maximum speed of 60, the railroad could not comply with both and preemption would be implied.

Cross-respondent argues that the state law duty conflicts with the federal standard for several reasons. Cross-respondent argues that the Secretary has determined that slower train speeds do not prevent accidents at grade crossings and so the Secretary chose to address protection of motorists through grade crossing protection instead. If every crossing in Georgia had the protection it needs, the railroad's argument might have merit. Considering however that the protection of crossings is limited to the available federal funds and limited also to "public crossings" the Secretary could not possibly address the safety of all crossings in this way. The purpose of the FRSA is to

"reduce deaths and injuries" as well as "reduce accidents" at railroad crossings. Slower train speeds will promote this goal.[15] Both Cross-respondent and the Solicitor General argue also that emergency braking will be counter to the purpose of § 213 because of the increased chance of derailment. Slowing down in a hazardous area does not require an emergency braking procedure however.[16]

Courts have held that these two requirements are not incompatible. *Florida East Coast Railway v. Griffin*, 566 So.2d 1321 (Fla. App. 1990); *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861 (Kan. 1986); *Carson v. Burlington Northern Railroad*, No. 89-O-513 (D.C. Neb. 7-5-90 unpublished). These courts found the speed limits set by the Secretary to be maximum limits only, not necessarily a speed that is safe. There is nothing in the federal law or federal regulations which *requires* a railroad to travel at the maximum limit. Therefore, there is no reason why the

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[15] In the reports to Congress, the Secretary noted that "the average number of fatalities per crossing accident is increasing". . . . "Several factors may be contributors to this trend . . . an example is higher average train speeds" (April, 1989, p.2-10). "Train speeds for fatal accidents are markedly higher than for all accidents, 70 percent" (*Id.* at 6-9) "Danger . . . increases with higher train speeds because both the pedestrians and the engine-men have less warning time of the other's presence. Also, the severity of an accident involving a high-speed train can be expected to be greater" (Nov. 1971, p.95)

[16] It is worth pointing out that Cross-respondent must slow down repeatedly anyway because of track conditions and other factors. The CSX Atlanta-Division Timetable, contained in the Record, demonstrates at p.5-7 that Cross-respondent is continually required to observe varying speed restrictions for reasons having nothing to do with local ordinances.

Railroad cannot physically comply with both requirements.

C. Lower Court decisions finding preemption of municipal ordinances have erroneously construed and misapplied the law.

Several Courts addressing the question of whether a municipal train speed ordinance is preempted under § 213 have ruled that these ordinances are preempted.[17] In almost every case, the Court found preemption of the municipal speed ordinance because the speed requirement had not been mandated at the state level. This question is not presently before the Court but in light of this Court's decision in *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, 111 S.Ct. 2476, ___ L.Ed. 2d ___ (1991) it is doubtful that this reasoning will continue to be accepted.[18]

These cases blindly followed the first appellate decision on the question. *Donelon v. New Orleans Terminal Co.*,

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[17] See *Mahony v. CSX Transportation Inc.*, ___ F.Supp. ___, (11th Cir. 7/20/92, No. 90-9052), *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861 (D.C. Kan. 1986), *CSX v. City of Tullahoma*, 705 F.Supp. 385 (E.D. Tn. 1988), *Consolidated Rail Corp. v. Smith*, 664 F.Supp. 1228 (D.C. Ind. 1987), *City of Covington v. Chesapeake & Ohio Railway*, 708 F.Supp. 806 (D.C. Ky. 1989), *Southern Pacific Transportation v. Town of Baldwin*, 685 F.Supp. 601 (D.C. La. 1987), *Chesapeake & Ohio Railway v. City of Bridgeman*, 669 F.Supp. 823 (W.D. Mich. 1987), *Smith v. Norfolk & Western Railway*, 776 F.Supp. 1335 (N.D. Ind. 1991).

[18] In *Mortier*, this Court held that an affirmative grant of regulatory authority to States could not generally be read to exclude similar authority in local political subdivisions. This Court explained that local political subdivisions are "components of the very entity the statute empowers."

474 F.2d 1108 (5th Cir. 1973). In *Donelon* the Court correctly found express preemption as the state and federal requirements covered the same subject matter. In *Donelon*, the Louisiana Parish officials concerned over two derailments in a thirty day period, passed a resolution to require the railroad to correct dangerous conditions of the *tracks and the roadbeds*. The 5th Circuit Court found the actions of the parish preempted by the FRSA. The Circuit Court however, based its decision on the requirement not having been passed at the state level, concluding that the "local safety hazard" exception of the FRSA was not applicable. The Court in *Donelon* was correct that the Parish's regulations were expressly preempted. The Parish in that case, was addressing the same safety hazard as the Secretary. Both regulations were concerned over derailments and both regulations attempted to regulate the tracks themselves. This decision and its reasoning prompted the line of decisions finding preemption of the municipal speed ordinances because they were not passed at a state level.

Not all Courts have followed this line of decisions. See *Runkle v. Burlington Northern*, 613 P.2d 982 (Mont. 1980), *Carson v. Burlington Northern Railroad Co.*, No. 89-0-513 (D.C. Neb. 7/5/90 unpublished) and *Florida East Coast Railway v. Griffin*, 566 So.2d 1321 (Fla. App. 4th Dist. 1990). These courts have refused to take the question of the railroad's negligence away from the jury, finding that the federal speed limits are "neither safe nor mandatory". *Carson*. As stated by the Court in *Florida East Coast*:

> We reject the appellant's contention that the federal act has preempted consideration of negligent conduct of a railroad and its agents when faced with a dangerous condition or event, notwithstanding that the acts of negligence involve

> a failure to reduce speed below the maximum limit established by federal law.

III. GEORGIA LAW IS NOT PREEMPTED BY FEDERAL LAW OR FEDERAL REGULATIONS WHERE GEORGIA ADDRESSES A "LOCAL SAFETY HAZARD".

In addition to allowing state regulation to continue until the Secretary of transportation has adopted a rule on the same subject matter, Congress expressly invited state regulation in certain circumstances. Under these circumstances the states may regulate even if federal law covers the same subject matter.

> . . . A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard and when not creating an undue burden on interstate commerce. 45 U.S.C. § 434

Determining whether the two common-law duties at issue fall under the "local safety hazard" exception requires deciding three distinct elements: first, whether a heavily traveled grade crossing in a municipality constitutes a "local safety hazard"; second, whether the requirements that a railroad place gate arms at a dangerous crossing and reduce its speed in a hazardous area are incompatible with a federal rule on the same subject matter; and third, whether these two requirements place an undue burden on interstate commerce.

A. The dangerous grade crossing at Cook Street in Cartersville, Georgia presents a "local safety hazard".

Congress believed that the "Secretary of Transportation should have general authority over all areas of railroad safety", Senate report 91-619. Congress however was also concerned with areas not susceptible to federal regulation. In discussing the Secretary's regulatory authority, Congress showed a clear concern that it not excessively limit the role of the States.

> Testimony presented before the committee, as well as experience with other safety laws which have national application seem to lead to the conclusion that the States should have a role in the total safety effort. In particular, the States ought to be able to impose regulations relating to local hazards so long as the regulations do not unnecessarily burden interstate commerce and are not inconsistent with Federal regulations. Senate report 91-619.

This concern lead to the "local safety hazard" exception in § 434. A "local safety hazard" is defined as an area where the hazard is not statewide in nature and not capable of being regulated by national standards. *Union Pacific Railroad Co. v. Public Utility Commission of Oregon*, 723 F.Supp. 526 (1989). The Secretary has not passed any regulation which would define those crossings in need of gate arms nor any speed requirement in areas posing certain hazards to the motoring public. These hazards are not capable of being properly regulated by national standards.

Considering the variety of topography and geography of states across the nation, the differences in the size of towns, the difference in the towns' relationship to the railroad, it is self-evident that not all areas of track pose the same safety hazards. Because of these differences,

these hazards are particularly susceptible to a common-law duty of care standard. A common-law duty of care is applicable statewide but requires something different at each crossing. A common-law duty requires different things at different times of the day. This duty of care takes into consideration the time of day, the weather conditions, the frequency of vehicle or truck traffic across different grade crossings, and the adequacy of the protection at the grade crossings in the area. Because of these varying conditions, States deal with the speed of a train in the same way that they deal with the speed of any other vehicle. The state imposes upon the operator a speed which is reasonable and safe under all of the then existing conditions.

B. Georgia's common-law duties to reduce speed and erect gate arms at a hazardous crossing does not create an undue burden on interstate commerce.

The state and federal laws at issue are "not incompatible". The state and federal laws can easily co-exist as Petitioner can easily comply with both laws. This was recognized by the court in *Sisk v. National Railroad Passenger Corp.*, 647 F.Supp. 861, 863 (1986). And the state requirements that the Railroad place gate arms at a dangerous crossing and reduce its speed in this hazardous area do not impose an undue burden on interstate commerce.

In cases finding an undue burden on interstate commerce, the regulations sought to regulate the train itself. Courts have correctly found that requiring cabooses and certain safety equipment on trains would impose too high a burden on the railroad company by requiring them to stop at every state line and change their equipment.

Missouri Pacific Railroad v. Railroad Commission of Texas, 850 F.2d 264, 268 (6th Cir. 1988), See also *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). Petitioner recognizes that federal law preempts virtually all regulations affecting the physical conditions of the train itself. But the common-law duties to install gate arms at hazardous crossings and to reduce speed in the face of dangerous conditions do not effect the structure of the train itself. Nor do they require the train to stop at the state line and change equipment or otherwise burden the train's ability to travel across state lines. They simply impose on the railroad the same duty that is placed on every other citizen or industry — the duty to refrain from negligently injuring others.

CONCLUSION

For all of the above and foregoing reasons the judgment of the Eleventh Circuit Court of Appeals that the railroad's duty to maintain a safe crossing has not been preempted by the Federal Railroad Safety Act should be affirmed. The finding of preemption made by the Court below regarding the absence of a duty to travel at a reasonably safe speed should be reversed.

Respectfully Submitted,

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